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John Sacco, Director
Office of Natural Resource Restoration
Natural and Historic Resources
Department of Environmental Protection
501 East State Street
P.O. Box 404
Trenton, NJ 08625-0404

Re: In re the Lower Passaic River, Directive No. 1 (directive 2003-01)

Dear Mr. Sacco:

This firm represents RTC Properties, Inc. ("RTC"), which acknowledges receipt of the above referenced directive. This letter is to advise you, in accordance with the directive's cover letter from Assistant Commissioner Marc Matsil and pursuant to N.J.A.C. 7:26C-4.2(g), that RTC Properties respectfully declines to undertake the activities demanded by the directive for the reasons set forth in this letter and its attachment. RTC further requests that the Department of Environmental Protection delete RTC from the list of directive respondents and confirm in writing that the Department does not regard RTC as a proper party to the directive.

In assembling the information and determining initially who shall receive the directive, it is understandable that the Department may not have had the opportunity to investigate as fully as possible each potential respondent's involvement with the facilities in question or to determine as among entities associated with each such facility whether they were potentially liable for alleged natural resource damages to the Passaic River. In the case of RTC, the incontrovertible facts establish that RTC is not a party legally or factually responsible for any of the environmental conditions addressed by the directive and, moreover, it would contravene established statutory and applicable case law as well as legislative and Department policy to treat RTC as a potentially responsible party. We look forward to your prompt acknowledgment relieving RTC from the directive.

RTC is a Brownfield developer with respect to the former Western Electric facility at 100 Central Ave., Kearny, New Jersey (referred to in the directive as "The Lucent Technologies Site-Program Identification No. 0034080"). When it entered into the purchase negotiations with AT&T in 1984, RTC became one of the first real estate holding companies to recognize the potential of the

then newly effective ECRA law to facilitate the re-vitalization of important urban properties that no longer were used for manufacturing purposes. RTC did everything required of a diligent purchaser at the time. Indeed, RTC went beyond relying merely upon ECRA to provide "buyer assurance" protection, which was a purpose of that innovative statute, and contractually ensured that the former owner and operator complied with all of its clean up responsibilities.[1] Closing of title under the purchase agreement was postponed until the Seller obtained an approved Clean Up Plan from the Department. Since acquiring title on July 29, 1985, the property has been put to uses that do not cause or contribute contamination to the Passaic River and the Department does not allege otherwise in the directive.[2]

The directive recites that the former Western Electric facility manufactured telecommunications equipment (par. 115) and ceased operations in January, 1984 (par. 111), over eighteen months before RTC took title to the property. With respect to the alleged activities that provide the basis for the directive, namely the use of various hazardous substances at the facility (par. 116), and the discharge of pollutants to sewers and to the River (par. 117), the directive recites that they occurred only "to 1984." By the express "findings" of the directive, RTC was not an owner at the time of alleged discharges from the facility, nor are any facts alleged in the directive that discharges occurred at the facility or to the River after RTC acquired the property. Simply put, RTC is not "in any way responsible" for the discharge of hazardous substances at or migration of contamination from the facility and is not therefore liable under the Spill Act or any other statute or common law.

A few additional facts underscore this conclusion:[3]

RTC and AT&T entered into an Agreement of Purchase and Sale as of April 16, 1984, shortly after the effective date of ECRA. The Agreement, by its terms, required that AT&T and its successors comply with ECRA to clean up the property as required by the Department. Because of delay in getting Department approval of the Clean Up Plan, the date for closing of the purchase was extended a number of times. Indeed, as of February 11, 1985, the agreement was amended to deal specifically with AT&T's inability to obtain an approved clean up plan within the dates originally set by the Agreement of Purchase and Sale. The amendment required that AT&T go beyond mere compliance with ECRA. AT&T was required, as a condition of closing of title, to certify that "no environmental right, claim or lien" of the Department existed other

[1] RTC knows of no facts and has no opinion whether AT&T and/or Lucent are proper parties to the directive or whether the former Western Electric facility's past operations caused any sediment contamination of the Passaic River, and nothing in this letter is intended to suggest otherwise.

[2] The factual recitation in the directive with respect to RTC's ownership is in error. Paragraphs 112 and 113 of the directive make it seem that Union Minerals acquired title in July, 1985 and sold the property to RTC in March, 1994. In fact, RTC is Union Minerals and Alloys Corporation; the corporate name changed in August, 1988. The reference in paragraph 113 to a March, 1994 deed was simply an intra-company transfer done in connection with a lot subdivision which did not involve any change in ownership of the property.

[3] RTC will provide supporting documentation if required by the Department to facilitate its removal from the directive.

than the completion of the Department approved clean up plan and to obtain an opinion of counsel on environmental issues.

Finally, an Amended Environmental Clean Up Plan was submitted to and approved by the Department on July 8, 1985. Once the Clean Up Plan was approved, on July 24, 1985, the parties made a final amendment to the agreement providing RTC assurances that the Seller would perform the clean up as required by the Department and would not seek to amend it in the future. On July 29, 1985 RTC took title to the property in reliance on the Department's approved clean up plan, the "buyer protection" features of ECRA, further assurances of performance from the Seller to complete the clean up promptly and in an orderly manner, and a certification from AT&T and an opinion of counsel for AT&T that all environmental obligations had been addressed. There is nothing more that any reasonable and diligent Brownfield's developer could have done to ensure the property it was purchasing was not a source of environmental contamination and to insulate itself from any liability for historic discharges.

The clean up did indeed proceed expeditiously. DEP provided oversight and inspection of the work. By letter of June 26, 1987, the Department confirmed that all drain lines were clean, soil remediation and interior building clean up had been completed, and only a portion of ground water remediation for volatile organic compounds nearby one building was still to be addressed by the Seller. The Department went so far as to acknowledge in writing to prospective tenants of the facility the completion status of cleanup and never voiced any concern about environmental conditions to RTC or to any prospective tenant regarding the facility.

In light of the above facts and circumstances, we believe you will readily understand that RTC was quite surprised to be named a directive respondent. When the Department issues a multi-million dollar directive to a property owner which has done everything that the Department expects of a Brownfield developer to turn potentially vacant and unused former manufacturing sites into job creating, environmentally compliant, tax-paying centers of economic activity, it is sending the wrong message, one that will have a chilling effect on future Brownfield development. We know that is not the intention of the Department.

RTC agrees with the goals of the Department in issuing the directive. Indeed, principals of RTC have been major supporters of initiatives to restore the Passaic River and have worked with environmental groups to secure some of the very same objectives that the Department has indicated for the River.

Although we are confident that the Department will act appropriately and remove RTC from the directive respondent list, we are compelled by the regulations to provide our "good cause"

defenses. Attached to this letter and made a part hereof are those defenses. Thank you for your anticipated consideration.

Very truly yours,

Michael L. Rodburg

MLR:kmm

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Enclosure
cc: Andrew Feuerstein, Esq.

"Good Cause" Defenses Pursuant to N.J.A.C. 7:26C-4.2(h)

1. RTC is not a party "in any way responsible" for natural resource injury (contaminated sediments) of the Passaic River within the meaning of the Spill Act, but is a mere property owner that acquired its property after any historic discharges at the property had ceased. No natural resource damage has occurred by reason of RTC's ownership of real property in the vicinity of the Passaic River.

2. RTC is not liable for any natural resource damages by reason of the provisions of N.J.S.A. 58:10-23.11g(d)(5) (bona fide purchaser defense).

3. Because RTC's liability, if any, is technical or vicarious, and any contribution to natural resource damages for which it may be liable is *de minimis*, the Directive violates due process of law under the federal and state constitutions and contravenes the decision of the NJ Supreme Court in *Marsh v. DEP*, 152 NJ 137, 150 (1997)("We expect, however, that DEP would not arbitrarily exercise its power to assert Spill Act claims against persons responsible for minimal damages.")

4. The Directive fails to provide a timely and meaningful hearing at the time of issuance or prior to enforcement in violation of the Due Process Clause of the United States Constitution, and therefore the Directive is not final administrative action, is invalid as agency adjudication, and no consequences whatsoever can attach to non-compliance with the Directive.

5. Neither the Spill Act nor the Brownfield Act authorizes the issuance of a Directive for performance of a natural resource damage assessment or interim compensatory restoration.

6. The Directive is contrary to the provisions of the Memorandum of Agreement among NJDEP and the Federal Natural Resource Trustees concerning the Passaic River, which is subject to joint trusteeship of state and federal trustees and governed therefore by the Trustee Council established by the MOA and not by NJDEP unilaterally.

7. The Directive deals with sediment contamination that is a constituent part of a USEPA lead NPL Site as to which a Remedial Investigation/Feasibility Study has commenced, and therefore the actions required under the Directive are pre-empted by CERCLA §122(e)(6) for failure to obtain USEPA prior approval.

8. The Directive is an unlawful attempt by the Department to displace USEPA as the lead agency at the Site and to interfere with USEPA's investigation and enforcement activity at the Site and therefore is preempted by CERCLA.

9. The Directive unreasonably exposes the recipients to duplicative obligations to the federal and state trustees who exercise co-trusteeship over these resources, in contravention of CERCLA and Spill Act provisions prohibiting duplicative recovery.

10. The Directive unreasonably exposes the recipients to inconsistent obligations to federal and state trustees who exercise co-trusteeship over the natural resources of the Passaic River, in contravention of the Due Process and Supremacy Clauses of the United States Constitution.

11. The Directive's demand for compensatory damages is arbitrary and capricious because the NJDEP does not have sole or exclusive actual management and control of the sediments or the actions demanded by recipients of the Directive and NJDEP has made no provision in the Directive for apportionment and coordination with federal trustees and others who exercise actual management and control of the activities demanded, for example, the US Army Corps of Engineers with respect to dredging of navigable waters and potential obstructions to navigation.

12. The Directive is inconsistent with the National Contingency Plan, including 40 C.F.R. §300.615, in violation of N.J.S.A. 58:10-23.11f(a)(3).

13. The Directive is arbitrary and capricious because the NJDEP has unreasonably and without basis proceeded against parties known to the NJDEP to have caused or contributed no more than *de minimis* damage to natural resources, and has failed and refused to proceed against entities known to the NJDEP to be substantially contributing factors to such damage, including publicly owned and operated sewerage collection, treatment, and discharge facilities and combined sewer outfalls that discharge into the Passaic River and its tributaries.

14. The Directive is arbitrary and capricious as to RTC because baseline conditions have improved since the time RTC acquired its property and therefore no measurable injury or damage has occurred for which RTC could be in any way responsible.

15. The Directive is inconsistent with the NJDEP's Technical Requirements for Site Remediation.

16. The Directive is arbitrary and capricious because it alleges without basis in fact that sediment contamination otherwise attributable to one or more individual sites named in the Directive has migrated and co-mingled at significant concentrations with contaminated sediments throughout the 17 mile Study Area.

RTC reserves the right to amend or supplement its statement of "good cause" defenses and reserves its right to challenge N.J.A.C. 7:26C-4.2(h) as arbitrary and capricious and violative of due process of law to the extent it purports to limit any defense interposed by RTC at any time in any proceeding.